No. 84-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, *Et Al.*,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR RESPONDENT HAMILTON BANK OF JOHNSON CITY IN OPPOSITION TO PETITION

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Dated: August 1, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Respondent denies that the "*Questions Presented*" are as stated by Petitioner. Rather, Respondent asserts that the single proper question presented is as follows:

> Did the court of appeals correctly rule that the application of zoning regulations by the Defendant Planning Commission, which divested Plaintiff's property of any economically viable use, constituted a "taking" for which the Defendant must provide just compensation.

OTHER PARTIES NOT LISTED IN THE CAPTION

WILBURN H. KELLEY, JR.,
County Judge
MITCHEL BEARD,
Planning Commission Member
ROBERT MEDAUGH,
Planning Commission Member
JACK MEAGHER,
Planning Commission Member
JOE BAUGH,
Planning Commission Member
CAROLYN WATERS,
Planning Commission Member
KENNETH MCNEIL,
Planning Commission Member
CHARLES MOSLEY,
Planning Commission Member
MORTON STEIN,
County Planner
THAYER MARTIN,
County Engineer

Hamilton Bank of Johnson City became a wholly-owned subsidiary of Third National Corporation on December 1, 1982, and on September 20, 1983, formally changed its name to Hamilton Bank of Upper East Tennessee. Other subsidiaries of Third National Corporation are: Third National Bank of Nashville; American National Bank and Trust Company of Chattanooga; Third National Bank in Anderson County; Merchants Bank; The First National Bank of Lawrenceburg; The Union Bank; Third National Bank in Sevier County; Citizens Bank; Bank of Obion County; First National Bank of Rutherford County; Third National Mortgage Company; Third Lease Corporation; Third National Life Insurance Company.

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The following abbreviations are used in this brief: "Tr." (trial transcript); "Ex" (trial exhibit).

TABLE OF AUTHORITIES

IN THE

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OCTOBER TERM, 1984

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HAMILTON BANK OF JOHNSON CITY,
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BRIEF FOR RESPONDENT HAMILTON BANK OF JOHNSON CITY IN OPPOSITION TO PETITION

Respondent, Hamilton Bank of Johnson City (hereinafter referred to as "Hamilton") respectfully submits that the Court should deny Williamson County Regional Planning Commission's (hereinafter referred to as "the Planning Commission") Petition for a Writ of Certiorari seeking review of a decision rendered by the Sixth Circuit. The Sixth Circuit decision reversed the district court's grant of a judgment notwithstanding the verdict in this Fifth Amendment case brought by Hamilton seeking compensation for the taking of its property.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Middle District of Tennessee are set forth in the Appendix to the Petition.

JURISDICTION

Hamilton does not question the jurisdiction of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and United States Code, Title 42, Section 1983 are correctly set forth in the Petition.

STATEMENT OF THE CASE

1. Factual Background

Hamilton is the owner of approximately 250 acres located in the Northern portion of Williamson County. (Ex. 9850, 9851). Prior to 1973, the property was owned by Willie Temple, who farmed the property. (Tr. 322). Several individuals were interested in developing the property for residential purposes and applied to the Williamson County Commission to have the Temple land rezoned from agricultural to residential cluster. (Tr. 322). In 1973, the Planning Commission changed its zoning ordinances to permit residential cluster development. (Tr. 322).

The Planning Commission originally approved the development plan for Temple Hills County Club Estates (hereinafter referred to as "Temple Hills") in 1973. (Ex. 01009, 01012, 01013, 01014). Between 1973 and 1979, the plan for the development of Temple Hills was reapproved

on a number of occasions under the original regulations that were in effect in 1973 at the time of the original approval, even though newer, tougher regulations had been inacted at various times between 1973 and 1979. (Ex. 9701, 9079, 01014, 01016, 0106A, 01022, 01032, 01056 and 01057; Tr. 1003, 142-51, 176-77). Between 1973 and 1979, the developer spent Three to Five Million Dollars on improvements to the property in reliance on the Planning Commission's approval. (Tr. 345, 115).

In 1979, for the first time, the Planning Commission attempted to change the rules of development in the middle of the game and retroactively applied new subdivision regulations and zoning ordinances to the Temple Hills project. (Ex. 9035, 01073; Tr. 149-51, 364).

The imposition of the regulations on the Temple Hills project made it impossible to complete. (Tr. 1721). The Planning Commission twice disapproved plans for development of the property under the new regulations. (Tr. 105-07). As a result, the property had no measurable economic value and Hamilton was accordingly divested of any economically viable use of the property. (Tr. 680-81, 716-17).

2. Proceedings Below

Hamilton brought this action against the Planning Commission in the United States District Court for the Middle District of Tennessee pursuant to the provisions of 42 U.S.C. § 1983 and § 1985. Hamilton contended that the actions of Defendants constituted a violation of its Federal Constitutional Rights under the Just Compensation Clause of the Fifth Amendment, and the equal protection and due process clauses under the Fourteenth Amendment. Hamilton also alleged various state court claims, including an allegation that Defendants were estopped from retroactively applying new subdivision

regulations and zoning ordinances to the Temple Hills project.

At the close of all of the evidence, the district court granted Defendants' motion for directed verdict on the substantive due process and equal protection claims. The case was then submitted to the jury on the remaining issues of procedural due process, taking without just compensation, and estoppel. In answer to special interrogatories, the jury found against Hamilton and in favor of Defendants on the issue of procedural due process. In addition, the jury returned a verdict that Hamilton had been denied economically viable use of its property in violation of the just compensation clause of the Fifth Amendment. The jury also found that Defendants were estopped under state law from requiring Hamilton to comply with the present zoning regulations as opposed to the 1973 zoning regulations. The jury assessed damages in the amount of $350,000 for the temporary taking of Plaintiff's property.

The Defendants subsequently filed a motion for judgment notwithstanding the verdict. The court granted the motion in part and denied it in part. The court allowed the jury verdict of estoppel to stand and issued a judgment of permanent injunction enjoining Defendants from requiring Hamilton to comply with present regulations rather than the 1973 regulations. In granting the Defendants' motion for judgment notwithstanding the verdict in part, the court held that judgment on the taking issue would be inconsistent with the jury's finding that the Defendants were estopped from applying current regulations. As a result, the Plaintiff lost its jury verdict for damages in the amount of $350,000.

Plaintiff then appealed the district court's judgment notwithstanding the verdict to the Sixth Circuit Court of

Appeals. The court of appeals reversed the judgment of the district court holding that there existed sufficient evidence that the Planning Commission had effected a temporary taking of Hamilton's property for which damages were correctly awarded. 729 F.2d 402 (6th Cir. 1984).

REASONS FOR DENIAL OF THE WRIT

1. No Conflict With Prior Decisions Of This Court.

This Court clearly established in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), that governmental regulations affecting an owner's use of his property may constitute a taking. In *Pennsylvania Coal*, Justice Holmes maintained that "if regulation goes too far, it will be recognized as a taking." 260 U.S. at 415. Moreover, the taking clause was explicitly held applicable to zoning regulations in *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), when this Court stated:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U.S. 183, 188, 72 L. Ed. 842, 48 S. Ct. 447 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 138 n. 36, 57 L. Ed.2d 631, 98 S. Ct. 2646 (1978)." 447 U.S. at 260.

This Court has also recognized that a taking need not be permanent, but that a temporary deprivation of property can constitute a taking for which damages are an appropriate remedy. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945).

Accordingly, this Court's recent decision in *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621

(1981), is in keeping with a long line of authority when it clearly indicates that a zoning regulation can effect a Fifth Amendment taking. The Petitioners argue that the court of appeals placed too much emphasis on the opinions of Justices Brennan and Rehnquist in *San Diego Gas*. But when one analyzes *Kimball* and the other cases cited by the court of appeals, it is clear that Justice Brennan's opinion is not the thin reed Petitioner argues it to be. The majority of this Court in *San Diego Gas* held the case nonjusticiable for lack of a final order. There is no evidence that they disagreed with the substantive law as stated by Justice Brennan. To the contrary, Justice Blackmun, the author of the majority opinion, himself acknowledged that the taking argument should not "be cast aside lightly." 450 U.S. at 633. This strongly indicates that Justice Blackmun saw at least some merit in the substantive contentions of San Diego Gas. Even more important is the fact that Justice Rehnquist, who filed a concurring opinion in the technical holding of the case, stated that he would agree "with much of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 633-34. Combining Justice Rehnquist with the four dissenters alone would constitute a majority of this Court.

Moreover, the views expressed in Justice Brennan's opinion were a logical extension of earlier decisions of this Court. Justice Brennan was unequivocal that a city's exercise of its police power through promulgation of zoning regulations can constitute a "taking" within the meaning of the Fifth Amendment, citing a long line of decisions of this Court recognizing this principal. 450 U.S. at 647-48. Justice Brennan asserted that each decision had as its source the opinion of Justice Holmes in *Pennsylvania Coal* and noted that this entire court had implicitly recognized this principal in *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978), when it analyzed whether

the restrictions on the plaintiff's property imposed by a New York City ordinance effected a "taking" within the meaning of the Fifth Amendment. 450 U.S. at 648-49.

Furthermore, Justice Brennan's dissent was based on sound policy considerations. Part of that policy, as Justice Brennan observes in a footnote to his opinion, is that damages must be awarded for temporary taking through overregulation because injunctive or declaratory relief would "hardly" prevent the enactment of subsequent unconstitutional regulations by the government entity. 450 U.S. at 655 n. 22.

Finally, it is important to note that Justice Brennan's dissent in *San Diego Gas* has subsequently been cited with approval by Justice Powell on at least two occasions. *See, Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981); *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

Accordingly, the court of appeals correctly applied a long line of this Court's decisions in ruling that there was sufficient evidence upon which the jury could find that Hamilton had been denied any economically viable use of its property by the Planning Commission's application of its zoning ordinances.

2. No Conflict With Other Courts Of Appeals Decisions.

A number of Circuit Courts of Appeal have been quick to join the Sixth Circuit in embracing the view of Justice Brennan in *San Diego Gas*. For example, recent decisions of the Seventh Circuit have applied the reasoning adopted by the Sixth Circuit in the instant case. In *Devines* v. *Maier*, 665 F.2d 138 (7th Cir. 1981), tenants who had been evicted from substandard housing by a city sought compensation under state law and the Fifth and Fourteenth Amendments to the United States Constitu-

tion. Senior Circuit Judge for the Sixth Circuit John Peck, sitting by designation, examined the plaintiffs' claims and held that the eviction was a "taking" entitling the tenants to just compensation under the Fifth Amendment. In concluding that the district court had erred in finding that the housing code regulations did not constitute a regulatory taking, Judge Peck cited Justice Brennan's dissent in *San Diego Gas* for the proposition that public takings of private property may occur as the result of regulations which were intended only to promote public health, safety or morals. 665 F.2d at 142. Judge Peck also explicitly pointed out that Justice Brennan's dissent expressed the view of at least five members of this Court as to the merits of the case in *San Diego Gas*. *Id.* The Seventh Circuit reiterated this view in *Barbian* v. *Panagis*, 694 F.2d 476, 482 n. 5 (7th Cir. 1982), when it stated that the dissent in *San Diego Gas* "reflects the view of a majority of the Court."

Similarly, the courts in the Ninth Circuit adhere to the reasoning employed by the Sixth Circuit in the instant case. In *Martino* v. *Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir.), *cert. denied*, 104 S. Ct. 151 (1983), plaintiffs, who had been precluded from developing their property by ordinances enacted by defendants, sought compensation under the Fifth Amendment. In reversing the district court's grant of summary judgment for defendants, the Ninth Circuit expressed the view that damages are an appropriate remedy for a temporary taking resulting from overregulation, noting that it agreed with the views expressed by "a majority of the Court" in *San Diego Gas*. 703 F.2d at 1148.

In addition, the Fifth Court adopted this same reasoning in *Hernandez* v. *City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *appeal dismissed*, 455 U.S. 901 (1982), *aff'd*

after remand, 699 F.2d 734 (1983). In *Hernandez*, the plaintiff was denied a zoning reclassification for his property when the city legislators realized that such a rezoning would increase the cost of obtaining a right-of-way easement across the plaintiff's land. Agreeing with the plaintiff's contention that the City's current zoning classification was unconstitutional, the court declared: "[I]t is well established that the application of a general zoning law to particular property will effect a 'taking' of that property under the just compensation clause of the Fifth Amendment if the ordinance denies the owner an economically viable use of his land." 643 F.2d at 1197. Accordingly, the court refused to grant the City immunity for damages resulting from the uncompensated taking. *Id.*

Petitioner's reliance on the Fifth Circuit opinion in *Frazier* v. *Lowndes County, Miss., Board of Education*, 710 F.2d 1097 (5th Cir. 1983), is misplaced. The court in *Frazier* did not address the issue of an appropriate remedy for a Fifth Amendment taking; it merely found that the plaintiffs' use of their property had not been deprived. *Frazier* involved an attempt by the defendant school board to increase the amount of rent to be paid by plaintiff lessees. In a brief discussion of the Fifth Amendment issue, the court ruled that the actions of the school board had not sufficiently deprived plaintiffs of their property interest to constitute a "taking." Thus, *Hernandez*, not *Frazier*, clearly reflects the Fifth Circuit's view that the awarding of damages is appropriate for a "taking" of property as a result of overregulation.

Finally, the First Circuit's opinion in *Citadel Corp.* v. *Puerto Rico Highway Authority*, 695 F.2d 31 (1st Cir. 1982), *cert. denied.*, 104 S. Ct. 72 (1983), does not necessarily conflict with the Sixth Circuit's opinion in the in-

stant case. In *Citadel*, governmental agencies had "frozen" development on plaintiff's property while planning to ultimately condemn it in order to build a highway. In refusing to award damages, the court seemed to be most influenced by the fact that the offending governmental agency was a "state" within the meaning of the Eleventh Amendment and was thus immune from a claim for damages in a federal action. 695 F.2d at 34. In the instant case, the trial court determined that the Defendants were not cloaked with Eleventh Amendment immunity because they were neither the state nor agents of the state. (Order dated December 18, 1981, set forth in Appendix). The Defendants have not appealed from that order. Because *Citadel* involved an agency immune from damages under the Eleventh Amendment, the court's other statements regarding damages for temporary takings are merely dicta.

3. Respondent's Right To Develop The Property Was Properly And Thoroughly Considered Below.

Petitioner persists in asserting that Hamilton cannot claim an unconstitutional temporary taking under the Fifth Amendment because the developer never previously submitted nor had approved a plat that complied with either the 1973 zoning ordinance or the 1977 and 1979 amended zoning ordinances.

As the record clearly indicates and as the court of appeals noted, the plat submitted by the developer was approved and reapproved on a number of occasions between 1973 and 1979. Actually, the Petitioner's argument is that the developer never submitted a plat that was in compliance with the applicable zoning ordinances *as interpreted* by the post-1979 Planning Commission. The court of appeals correctly observed that "[t]he plat was apparently in compliance under one interpretation of the

zoning regulations, but not under an alternate interpretation." 729 F.2d at 403.

Furthermore, as pointed out by the court of appeals, this Court's opinion in *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), does not require a contrary result. In *Agins*, the plaintiffs argued that the "enactment" of the zoning ordinances which restricted plaintiffs' use of their property constituted a "taking." The plaintiffs, however, never submitted a development plan requiring the ordinances to be applied to them. This Court concluded that for a taking to occur the plaintiffs in *Agins* would be required to submit a development plan. Hamilton, on the other hand, submitted a plan which was disapproved for reasons that imply a disapproval of any plan which would allow Hamilton to develop the property for an economically viable use.

Moreover, as stated by the court of appeals, the Petitioner's argument that the plat never complied with the applicable zoning ordinances is inconsistent with the jury's findings regarding the state law estoppel claim. Since there was material evidence from which the jury could find that the developer had received previous approvals by the Planning Commission and since the state law estoppel verdict by necessity means that the jury found that the developer had obtained prior approval, then the Petitioner's argument that the plat was never in compliance with the 1973 zoning ordinance must fail.

The Petitioner also contends that the court of appeals incorrectly upheld the sufficiency of the evidence that Hamilton's property retained no economically viable use after the Planning Commission's application of its ordinances. Petitioner's contention is unfounded, however, because the evidence overwhelmingly shows that Hamilton's property was rendered useless by the actions of the Planning Commission.

Whether property has been divested of any economically viable use is a factual inquiry. *Loreito* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S 419, 426 (1982); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174-75 (1979). The jury clearly found that Hamilton's property retained no economically viable use as a result of the actions of the Planning Commission. Furthermore, even though the Petitioner never seriously argued on appeal that the property retained an economically viable use, the court of appeals found sufficient evidence to uphold the verdict of the jury. Accordingly, Petitioner's contentions present purely factual issues that have been addressed by the jury, reviewed by the court of appeals, and do not require review by this Court.

CONCLUSION

The decision of the court of appeals in the instant case properly follows decisions of this Court, and is wholly consistent with the purposes and goals of the Fifth Amendment. Thus, Respondent respectfully submits that there are no compelling reasons for this Court to grant the Petition for Writ of Certiorari, and that it, therefore, should be denied.

Respectfully submitted,

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Attorney for Hamilton Bank of Johnson City

APPENDIX

APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 81-3567

HAMILTON BANK OF JOHNSON CITY

vs.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, *et al*

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J. Murdic, Deputy Clerk

ORDER

The defendant's motion to dismiss came to be heard on December 14, 1981 and was denied for reasons stated on the record.

John T. Nixon
JOHN T. NIXON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 81-3567
JUDGE JOHN NIXON

HAMILTON BANK OF JOHNSON CITY,
Plaintiff

vs.

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, *Et Al*,
Defendants.

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Come the defendants and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure move for an Order dismissing the plaintiff's action on the grounds that it fails to state a claim upon which relief can be granted against the defendants.

In support of the Motion, the defendants would show that the plaintiff's Complaint alleges in Paragraph Two (2) that the Williamson County Regional Planning Commission was established pursuant to Tennessee Code Annotated § 13-3-101 and that the individual named defendants are either members of the Williamson County Regional Planning Commission or employees of and on the staff of the Williamson County Regional Planning Commission.

The plaintiff thus concedes in the sworn Complaint that the Williamson County Regional Planning Commission is a state agency created pursuant to Tennessee legislation. Defendants thus respectfully submit that the Complaint fails to state a claim against any of the defendants due to the fact that state

agencies along with their members and employees are granted immunity under the Eleventh Amendment of the Constitution of the United States.

In support of this Motion, the defendants rely upon the sworn Complaint filed by the plaintiff, the applicable law and the Memorandum attached in Support of said Motion.

Respectfully submitted,

STEWART, ESTES & DONNELL

By: Thomas M. Donnell, Jr.
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14th Fl, Third Nat'l Bank Bldg.
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615/244-6538
Attorneys for Defendants

CERTIFICATE

I certify that an exact copy of this Motion with supporting Memorandum was hand delivered to the offices of Frank C. Gorrell and G.T. Nebel, Attorneys for Plaintiff at BASS, BERRY & SIMS, 2700 First American Center, Nashville, Tennessee 37238 on this the 18th day of September, 1981.

Thomas M. Donnell, Jr.
THOMAS M. DONNELL, JR.